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SUPREME COURT, U.S.

No. 06-1655

IN THE

Supreme Court of the United States

MAUHOI TUNG,

Petitioner,

v.

HENRY CHIU, D.D.S.,
d/b/a MOTT STREET DENTAL SERVICES, P.C.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF NEW YORK

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

In this New York State dental malpractice case, Mauhoi Tung petitions this Court to reargue the order of the New York Court of Appeals denying his motion for leave to appeal. Petitioner appeals despite being made aware twice, once on his original motion for leave to appeal and again on his motion to reargue, that under Article VI §3(b)(7) of the Constitution of the State of New York and New York Civil Practice Law and Rules §5602, the Court of Appeals does not have jurisdiction to hear an appeal from an action that originates in the Civil Court of the City of New York. There is no basis for jurisdiction, and petitioner fails to set forth any grounds of jurisdiction as required for the granting of a Writ of Certiorari.

Petitioner brought his action in the Supreme Court of the State of New York, New York County. By order of Justice Sheila Abdus-Salaam, Supreme Court, New York County, petitioner's claim was referred to the Civil Court under provisions of the New York Civil Practice Law and Rules. Once the matter was referred to the Civil Court, the respondent obtained summary judgment by demonstrating through an expert that there was no malpractice in the treatment rendered to the petitioner. Following summary dismissal of his claim in the Civil Court, a series of appeals ensued, all of which were denied. Mr. Tung now petitions this Court to relieve him from the order of the New York Court of Appeals in an action that is exclusively reserved to the state and does not involve any federally protected right or interpretation of a federal or state statute.

Pro se petitioner Mauhoi Tung seeks to recover monetary damages for injuries he claims to have suffered as a result of

dental malpractice alleged against the defendant Henry Chiu, DDS d/b/a Mott Street Dental Services, P.C. The action was commenced in the Supreme Court, New York County on September 8, 2004 (Index No: 119616/03). By order of the Honorable Sheila Abdus-Salaam, which order is unappealable, the case was removed to the Civil Court of the City of New York, a court of limited jurisdiction under Judiciary Law of the State of New York as authorized under Article VI of the Constitution of the State of New York in accordance with New York Civil Practice Law and Rules §325(d).[1]

After the case was removed to the Civil Court, the respondent moved for and obtained summary judgment on the merits by order of Hon. Jeffrey Oing.[2] Thereafter, petitioner filed a Notice of Appeal to the Appellate Term of the Supreme Court for the First Judicial Department on February 18, 2005. Under New York law, the Appellate Terms of the First and Second judicial departments have jurisdiction over appeals as of right from the Civil Court of the City of New York and the County Courts. By decision and order of the Appellate Term, the order of the Civil Court was affirmed on January 20, 2006. Thereafter, petitioner moved in the Appellate Term for reargument and leave to appeal to the

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1. N.Y.C.P.L.R. §326(b) treats this matter as having originated in the Civil Court once it has been removed: "***[s]ubsequent proceedings shall be had in the court to which it has been ordered removed as if the action had been originally commenced there***."

2. The Civil Court correctly determined that the respondent established his entitlement to judgment as a matter of law. In opposition, petitioner failed to raise a triable issue of fact. Moreover, no expert affidavit was proffered to establish that the respondent deviated from accepted standards of good dental practice in causing injury to the petitioner.

Appellate Division, First Department. By order of the Appellate Term dated April 5, 2006, petitioner's motion to reargue and for leave to appeal to the Appellate Division was denied. Thereafter, petitioner moved in the Appellate Division for reargument and leave to appeal to the Appellate Division.

Under New York law, petitioner's ability to appeal as of right terminated in the Appellate Term of the Supreme Court. His right to further appeal was by permission only and terminated in the Appellate Division of the Supreme Court, a procedural rule that this pro se petitioner has never grasped. By order of the Appellate Division dated July 13, 2006, petitioner's motion for reargument and leave to appeal to the Appellate Division was denied.

Thereafter, petitioner moved in the Court of Appeals of the State of New York for leave to appeal. By order of the Court of Appeals of the State of New York dated October 26, 2006, petitioner's motion for leave to appeal was denied. The denial of petitioner's motion for leave to appeal was based on the fact that under the Constitution of the State of New York, petitioner exhausted his appellate remedies once the Appellate Division refused to hear his appeal.

Nevertheless, despite having been explicitly informed that he had exhausted his remedies and had no right to further appeal, petitioner again moved in the Court of Appeals for permission to appeal. On January 11, 2007, by order of Hon. Judith S. Kaye, Chief Judge, presiding, petitioner's motion was again denied on the same ground that it had previously been denied, i.e. that New York's highest Court did not have jurisdiction under New York's Constitution to hear an appeal from an action originating in the Civil Court.

Petitioner now seeks relief from the order of the Civil Court of the City of New York, two orders of the Appellate Term of the Appellate Division of the Supreme Court of the State of New York, two orders of the Appellate Division of the Supreme Court of the State of New York, and two orders of the New York Court of Appeals. Mr. Tung petitions the United States Supreme Court ostensibly on the ground that he is dissatisfied with the outcome in the state Courts. He apparently finds it unfair that he has a meritless case and was never able to prove his claim that the respondent deviated from accepted standards of good dental practice. He raises no federal question. He does not raise an issue involving the application or interpretation of a federal statute. He does not claim that he has been damaged as a result of the application or interpretation of a state statute that is repugnant to the federal constitution. For the reasons discussed herein after, the Petition for a Writ of Certiorari should be denied.

SUMMARY OF THE ARGUMENT

Generally, according to 28 U.S.C. §1257(a), the United States Supreme Court has jurisdiction over a Petition for a Writ of Certiorari where a final judgment of a state Court of last resort brings into question a statute of the United States. In this case, the order of the Appellate Division of the Supreme Court of New York, the First Judicial Department did not concern a statute of the United States. The order of the Appellate Division also did not draw into question any statute of the state of New York as being repugnant to either the Constitution of the State of New York or the Constitution of the United States. Finally, petitioner does not assert that any right or privilege guaranteed under the Constitution of the United States was violated by the full and fair hearing obtained in the Courts of the State of New York. No decision

in this case by a New York Court has dealt with a federal question. In fact, petitioner has never raised a federal question in any of the prior proceedings. A review of the record in this case demonstrates that none of the orders from the Courts of the State of New York concerned a question of federal law. Furthermore, petitioner does not even allege that any right of his, guaranteed by the laws of the United States or the laws of the State of New York were violated by the decisions and orders rendered by any New York State Court.

ARGUMENT

Pursuant to 28 U.S.C. §1257(a), the petition should be denied on jurisdictional grounds, as the petition fails to set forth the jurisdictional requirements for the granting of a Writ of Certiorari. This Court has jurisdiction over a Petition for a Writ of Certiorari where a final judgment of a state court of last resort brings into question any statute of the United States.[3] Here, petitioner fails to bring into question any statute of the United States. He merely asserts that "Respondent could deprive any people of body right and health for his premeditated malpractice(s) plan to harm the federal constitution" (Mr. Tung's Petition for a Writ of Certiorari, pg. 16). This Court also has jurisdiction over a Petition for a Writ of Certiorari where —

> The validity of a statute of any State is drawn in question on the ground of its being repugnant to the

3. Pursuant to the New York State Constitution, Article VI, §3(b)(7); N.Y.C.P.L.R. §5602, the New York Court of Appeals did not have jurisdiction over petitioner's motion for reargument under the N.Y.C.P.L.R. §326(b), which treated petitioner's original suit as having originated in the Civil Court once it was removed from the Supreme Court of New York. See also *Moya v. Penske Truck Leasing Co.*, 555 (N.Y. 6-5-2007). Because the New York Court of Appeals has no jurisdiction over suits originating in the Civil Court, the Appellate Division was petitioner's state court of last resort.

> Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States.

28 U.S.C. §1257(a). Here, petitioner does not draw into question any statute of the State of New York nor does he claim that any title, right, privilege, or immunity under the Constitution has been violated. He merely attempts to assert that the respondent alleged premeditated malpractice could harm the federal constitution.

In *Mellon v. O'Neil*, 275 U.S. 212, 214 (1927), *cert. denied*, (citing, *Whitney v. California*, 274 U.S. 357,360 (1927)) this Court held that "It has long been settled that this court acquires no jurisdiction to review the judgment of a state court of last resort on writ of error, unless it affirmatively appears upon the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court." Furthermore, "It is not enough that there may be somewhere hidden in the record a question, which if it had been raised would have been of a federal nature" *Id.* at 215 (citing, *Dewey v. Des Moines*, 173 U.S. 193, 199 (1899)). The court of last resort in New York never ruled on a federal question, therefore depriving this Court of jurisdiction over the instant petition.

Ordinarily, the United States Supreme Court will only grant a Petition for a Writ of Certiorari for compelling reasons. The circumstances where the Court will usually grant certiorari are when

> "A United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power" (Sup. Ct. R. 10(a)).

Secondly, where

> "A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals" (Sup. Ct. R. 10(b)).

Finally, the United States Supreme Court may also grant a Petition for a Writ of Certiorari

> "Where a state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court" (Sup. Ct. R. 10(c)).

Under the general criteria set forth in the rules of this Court, Mr. Tung's petition should not be granted. None of the criteria for granting a writ are stated in Mr. Tung's petition. This case was never decided in federal Court and was never heard by a United Stated Court of Appeals.

Furthermore, the decision of the Appellate Division of the New York State Supreme Court did not concern a federal question and could therefore not be in conflict with a decision of this Court or of a United States Court of Appeals. Finally, at no point in this long and torturous course of litigation was a federal question ever presented or considered that would require a decision by this Court.

There is no claim in this case that a federally protected right has been violated. Petitioner does not call into question any specific provision of the United States Constitution nor does he assert that any of his rights as guaranteed by the laws of the United States were violated by the decisions of the Courts of the State of New York.

Finally, it is worth noting that Supreme Court Rule 14(4) states: "The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding requiring consideration is sufficient reason for the Court to deny a petition." Giving this pro se litigant every benefit of a doubt, his petition is so grossly unclear that the basis of his argument for certiorari is incomprehensible. He fails to allege any federal question whatsoever. He fails to address even in the most rudimentary manner why the highest Court of the United States should hear his case. Despite the clear language of two decisions of the New York Court of Appeals regarding its lack of jurisdiction, petitioner continues to abuse the judicial system to harass the respondent. Petitioner has persistently attempted to advance meritless arguments. He has demonstrated his intentions to harass the respondent by his pursuit of meritless appeals. If the petitioner were an attorney, he would have been sanctioned for engaging in frivolous conduct.

CONCLUSION

For the reasons set forth herein above, Mr. Tung's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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